

HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI
AND
HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
Writ Appeal No.478 of 2007

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Between:

R. Surender and others. ...Appellants

And

The Commissioner, Endowments Department,
Hyderabad and others. ...Respondents

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:: J U D G M E N T ::

Counsel for the appellants : Sri P. Gangaiah Naidu,
Senior Advocate, assisted by
Sri N. Bharat Babu.

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14th June, 2007

Per G.S. Singhvi, C.J.

This appeal is directed against order dated 24-4-2007 passed by the learned Single Judge in Writ Petition No.9475 of 2006, whereby he declined to interfere with the transfer of the appellants, who are working in different endowments and charitable institutions.

A perusal of the record shows that the appellants challenged their transfer mainly on the ground that in the absence of any provision in the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Office Holders and Servants Service Rules, 2000 (for short, 'the 2000 Rules') for transfer of employees from one endowment or charitable institution to another, the Commissioner of Endowments (hereinafter referred to as 'the Commissioner') could not have exercised the power under Section 39 of the Andhra Pradesh

Charitable and Hindu Religious Institutions and Endowments Act, 1987 (for short, 'the Act'); that the transfer of the office-holders and servants from one endowment or charitable institution will result in change of their status and service conditions and that the impugned transfer is violative of transfer policy framed by the State Government.

The learned Single Judge considered the matter at length and dismissed the writ petition by recording detailed reasons. He held that even in the absence of rules, the Commissioner can exercise power under Section 39 of the Act. He further held that the transfers were effected in public interest and the interest of the institution and that the petitioners have failed to make out a case for judicial intervention. While dealing with the issue of adverse impact of the appellants' transfer on their service conditions, the learned Single Judge held as under:

“In the counter affidavit, it is clearly stated that though the Office Holders and servants are transferred from their parent establishment to other institutions, but for the purpose of seniority, their lien is maintained in the parent institution and promotions will be effected as per their turn in the parent-institution. In that view of the matter, though by virtue of the orders of transfer, petitioners are required to work in different institutions than their parent establishments, but, so long as their seniority is maintained in their parent institutions and promotions are effected as and when their turn comes up in the parent institution, their service conditions are not adversely affected. That apart, Rule 33 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Office Holders and Servants Service Rules, 2000, framed under Section 35 (4) of the Act, gives protection only for the purpose of recruitment, seniority and promotion, and, it does not in any way deal with the transfers, for which, express provision has been made in Section 39 of the Act, and, so long as the protection as provided in Rule 33 is extended, there cannot be any grievance for the petitioners.”

The learned Single Judge also rejected the appellants' plea that the Commissioner had acted in violation of the transfer policy and held

that the so-called violation of the administrative instructions cannot be made a ground for nullifying the exercise of power under Section 39 of the Act.

Sri P. Gangaiah Naidu, learned senior counsel appearing for the appellants argued that the ratio of the judgment of the two Division Benches in **P.S.R. Subrahmanyam v. Commr., Endowments**^[1] and **A.B. Srinivasan v. State of A.P. & Ors.**^[2] is not applicable to the appellants' case because, at the relevant time, the State Government had not framed rules under Section 35 (4) of the Act. He then referred to the 2000 Rules to show that each religious or charitable institution and endowment is an independent unit and argued that the Commissioner does not have the jurisdiction to transfer the office holders and employees from one unit to the other. Learned senior counsel further argued that wholesale transfer of the employees including those belonging to Class-IV posts smacks of patent arbitrariness and the learned Single Judge committed a serious error by refusing to nullify the exercise of power by the Commissioner under Section 39 of the Act. In support of his argument, Sri Naidu relied on the judgment of Supreme Court in Civil Appeal No. 2697 of 2007 – **Tejshree Ghag v. Prakash Parashuram Patil**, decided on May 17, 2007.

We have given serious thought to the arguments of the learned counsel, but have not felt impressed. Sections 35 and 39 of the Act read as under:

“35. Appointment of office holders and servants, etc.

(1) Every vacancy, whether permanent or temporary, amongst the office-holders or servants of a charitable or religious institution or endowment shall be filled by the Trustee:

Provided that in the case of a charitable or religious institution or endowment whose annual income exceeds rupees ten lakhs the Executive Officers, shall appoint the office holders and servants thereof.

(2) No person shall be considered for appointment to any

vacancy under sub-section (1) on the ground merely, that he is entitled for such appointment according to -

(i) any scheme framed, agreement entered or judgment, decree or order passed by any court, tribunal or other authority prior to the commencement of this Act.

(ii) any custom or usage; or

(iii) the principle that he is next in the line of succession to the last holder of office.

(3) Every Office holder or servant including Pedda Jeeyangar, Chinna Jeeyangar and Mirasidar, Archaka and Pujari whether hereditary or not holding office as such on the date of commencement of this Act, shall continue as such office holder or servant and notwithstanding any scheme, judgment, decree or order of a Court, Tribunal or other authority or any agreement or custom or usage relating to the payment of any prerequisites, emoluments or remuneration, either in cash or kind or both, before the commencement of this Act, be paid only such emoluments as may be prescribed.

Provided that it shall be lawful for the Government to direct such office holders and servants as they may consider necessary to acquire such qualifications and to undergo training in such manner, for such period and on such terms as may be prescribed.

(4) The qualifications, method of recruitment and temporary appointments, pay and allowances, discipline and conduct and other conditions of service of the office holders and servants of a charitable or religious institution or endowment, shall be such as may be prescribed.

39. Transfer of office holders and servants:

(1) The Commissioner shall have power to transfer any office holder or servant attached to a charitable or religious institution or endowment from that institution or endowment to any other institution or endowment in accordance with such rules as may be made by the Government in this behalf.

(2) The Deputy Commissioner or the Assistant Commissioner, as the case may be, having jurisdiction over the area shall have power to transfer any office holder or servant attached to a charitable or religious institution or endowment from that institution or endowment to any other institution or endowment in accordance with such rules as may be made by the Government in this behalf.”

A reading of Section 39 makes it clear that the Commissioner is empowered to transfer any office-holder or servant attached to a charitable or religious institution or endowment to any other institution or endowment in accordance with the rules as may be made by the government. Likewise, Deputy Commissioner and Assistant Commissioner having jurisdiction over the area are possessed with the power to transfer any office holder or servant attached to a charitable or religious institution or endowment to any other institution or endowment in accordance with the rules framed by the government in this behalf.

The question whether the exercise of power by the Commissioner under Section 39 of the Act can be invalidated on the premise that the government has not framed rules, was considered and answered in negative by two Division Benches of this Court in **P.S.R. Subrahmanyam v. Commr., Endowments** and **A.B. Srinivasan v. State of A.P. & Ors.** (supra). In the first case, the Division Bench held as under:

“.....The petitioners are working in several Institutions. The power to appoint and transfer such officers vests with the Commissioner to transfer such official from one Institution to another without affecting their service conditions. When once power is conferred on a particular authority, here, the Commissioner, in the matter of appointment of its employees, such an authority has got powers to transfer. Apart from this, Section 39 of the new Act is quite clear as to the powers of Commissioner for transfers. The assertion of the learned Counsel for the petitioners that unless rules are framed under the present new Act, as framed under the old Act, in the matter of transfer, the Commissioner does not get jurisdiction and the present transfers as such are without jurisdiction in the absence of rules as contemplated under Section 39 of the Act, has no force. When it is not in dispute that an authority who appoints will have the power to transfer, mere absence of Rules will not render the power of transfer of such officer illegal. A close reading of Section 39(1) makes it clear that the transfers may be made. The word used in respect of framing of Rules is ‘may’ but not ‘shall’. After all making the Rules is

only to avoid confusion or ambiguity in carrying out the purport of the Act more effectively. In other words, it is a procedural or internal regulation as to how the authorities have to discharge the powers and by whom the power has to be exercised. When the transfer is within the ambit of the power of appointment, absence of rules dealing with the transfers will not make such transfers illegal.”

In the second case, another Division Bench held:

“Where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of Rules unless the statute expressly provides for the same. In other words framing of the rules is not condition precedent to the exercise of the power expressly and unconditionally conferred by the statute. The expression “subject to the Rules” only means, in accordance with the rules, if any. If rules are framed, the powers so confirmed on authority could be exercised in accordance with these rules. But, if no rules are framed there is no void and the authority is not precluded from exercising the power conferred by the statute.”

In our opinion, the interpretation placed by the two Division Benches on Section 39 of the Act represents the correct legal position and the learned Single Judge did not commit any error by refusing to interfere with the transfer of the appellants on the ground of violation of Section 39.

The argument of Sri Naidu that the ratio of the above noted two judgments cannot be applied to the cases of the appellants’ because, at the relevant time, the State Government had not framed rules under Section 35(4) sounds attractive, but lacks merit. Undisputedly, the 2000 Rules do not regulate transfer of the office-holder or servant attached to a charitable or religious institution or endowment. Therefore, the ratio of the two Division Bench judgments will have direct bearing on the interpretation of Section 39 even after framing of the 2000 Rules, and we do not see any reason to interpret that section

in a manner, which may result in curtailing the statutory power vested in the Commissioner to transfer any office-holder or servant attached to a charitable or religious institution or endowment to any other institution or endowment.

The expression “in accordance with such rules as may be made” used in Section 39 means that if the government makes rules for regulating transfer, then the Commissioner has to exercise power in accordance with such rules. However, the absence of specific rule regulating transfer cannot lead to an inference that the Commissioner does not have the power to effect transfers. To put it differently, the absence of rules cannot denude the Commissioner of the power conferred upon him by the Legislature of the State.

The judgment of the Supreme Court in **Tejshree Ghag v. Prakash Parashuram Patil** (supra), on which reliance has been placed by Sri Naidu, is clearly distinguishable. The facts of that case show that the respondents, who were appointed as Assistant Deputy Education Inspectors (ADEIs), were transferred to the post of Assistant Project Officer/Assistant Teacher and those who had been working as Assistant Teacher/Assistant Project Officer were transferred to the posts of ADEI. As a result of that, the pay of the respondents was reduced. The High Court quashed the orders of transfer by recording the following observations:

"What emerges from the above discussion is that the post of A.D.E.I had been recognized as distinct post under the recruitment rules. The appointment to the said posts is both by promotion as well as by direct recruitment. The promotion is from the post amongst others of Assistant Masters, A.D.E.I.s have promotional avenue to the post of Deputy Education Inspector to which posts the other posts in Grade III are not entitled for consideration. The post of A.D.E.I. as set out earlier carries higher pay scale than those other posts. In these circumstances, the respondent authorities could not have clubbed these posts under a common seniority or for that matter made the posts transferable from one to another. This would be treating holders of dissimilar posts as belonging to one class,

which they are not. This will also be in violation of the recruitment rules and affecting the promotional avenue of A.D.E.I.s. Though there is no right to promotion, there is right to be considered. By the action of transfer, this right of the Petitioner has been affected. This clearly amounts to an infringement of Article 14 and 16 of the Constitution of India."

The High Court further held that the transfer of the petitioners to the posts carrying lower time scale would be violative of Articles 14, 16 and 311 of the Constitution because that would amount to reduction in rank. The relevant portion of the High Court's order, which has been extracted in the judgment of the Supreme Court, is as under:

"The order entailed loss of pay as well as loss of seniority and postponement of future chances of promotion. It is in that context the Apex Court held in that case that the effect of reduction in rank, the appellant suffered loss of pay and also suffered loss of seniority as also postponement of future chances of promotion to the senior scale. On the facts, therefore, the court held that the appellant was not reverted for administrative reasons for unavailability of post but for different reasons. The act of the Respondent State therefore, in transferring the petitioner from the higher time scale to lower time scale would attract Article 311 of the Constitution of India. A reduction in the rank may be by way of punishment or it may be an innocuous thing. If the Government servant has a right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. In such cases the test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. In the instant case, the Petitioners suffer penal consequences inasmuch as the petitioner's are losing their emoluments and privileges of the rank"

Their Lordships of the Supreme Court noted that the terms and conditions of the respondents are regulated by the rules framed under proviso to Article 309 of the Constitution, which were titled as 'Maharashtra Education Service Administrative Officer of Municipal

School Board, Assistant Deputy Educational Inspector, Assistant Project Officer, Assistant Teacher in Junior Colleges of Education, Coordinator, Councillor, Extension Officer in State Council of Educational Research and Training Pune, Lecturer in Junior Colleges, Programme Assistant, Science Supervisor, District Science Supervisor, Subject Assistant, Subject Expert and Technical Assistant (Recruitment) Rules, 2005' (Rules)', and held:

“The orders of transfer were passed by Authority in purported exercise of its executive power. Executive power can be exercised only in terms of the extant rules. It is well-settled that where executive order results in civil consequences, principles of natural justice are required to be complied with prior thereto. It is not a case where an order of transfer was passed by way of change of place of employment within an organization simpliciter. An order of transfer ordinarily should be in terms of the existing rules. Transfer may even be incidental to the conditions of service, but thereby nobody can be deprived of his existing right. Existence of a power and exercise thereof are two different concepts. An Executive power in absence of any statutory rules cannot be exercised which would result in civil or penal consequences. Such exercise of power must, moreover, be bona fide. It cannot be done for unauthorized purpose. An Executive order passed for unauthorized purpose would amount to malice in law. An order of transfer cannot prejudicially affect the status of an employee. If orders of transfer substantially affect the status of an employee, the same would be violative of the conditions of service and, thus, illegal. Transfers must be made to an equivalent post.....”

From what we have extracted above, it is clear that the transfers, which were subject matter of challenge before the High Court, had adversely affected the seniority and pay scales of the employees. Therefore, the Bombay High Court held that the executive power of the State cannot be exercised in a manner which would affect substantive rights of the employees. Their Lordships of the Supreme Court approved the view expressed by the Bombay High Court and held that the impugned transfers had adversely affected the service conditions of the employees.

In the present case, the transfer of the appellants has not altered their status or conditions of service. They will continue in those cadres in which they were working before the issue of transfer orders. Their pay, status and seniority will not be adversely affected. Their chances of promotion will also remain in tact. Therefore, they cannot seek invalidation of the transfers on the ground of violation of the conditions of service.

We are further of the view that the transfers of the appellants cannot be invalidated only on the ground of violation of the policy framed by the government. Such policies are meant for internal administration and guidance of the competent authority and violation thereof cannot be made a ground for invalidation of the exercise of power of transfer by the competent authority – **Shilpi Bose v. State of Bihar**^[3].

Before concluding, we consider it proper to mention that in order to alleviate the fear of the persons like the appellants that their conditions of service will be adversely affected, this Court had, while dismissing Writ Appeal No.464 of 2004 – N. Prakash and others v. Government of A.P. and others, issued the following directions:

“.....However, with a view to safeguard the conditions of service of the appellants and similarly situated persons, we direct that the competent authorities should prepare the seniority list of various cadres of the endowments and charitable institutions, and circulate the same within a period of three months. We further direct that as and when any of the appellants become eligible to be considered for promotion within their original units, then the claim of the eligible employee shall be considered in accordance with law.”

In our opinion, the ends of justice will be met by declaring that the aforementioned directions would apply to the appellants and all other similarly situated persons. Ordered accordingly.

In the result, the appeal is dismissed subject to the above mentioned directions.

As a sequel to dismissal of the writ appeal, WAMP.No.916 of 2007 filed by the appellants for interim relief is also dismissed.

G.S. SINGHVI, CJ

14th June, 2007

C.V. NAGARJUNA REDDY, J

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[\[1\]](#) 1997 (6) ALD 57
[\[2\]](#) 1998 (2) ALD 640
[\[3\]](#) AIR 1991 SC 532